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84-1342

No.____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

SARGENT ELECTRIC COMPANY,
FREDERIC B. SARGENT AND
RALPH D. VRYENHOEK,

*Petitioners*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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52pp

## QUESTION PRESENTED

Whether, in order to establish a felony violation of Section 1 of the Sherman Act, the government must prove beyond a reasonable doubt as a substantive element of the crime an actual purpose or effect of restraining interstate commerce, or whether it is sufficient simply to prove a conspiracy affecting *intrastate* commerce and enough contacts with interstate commerce to warrant jurisdiction under the Commerce Clause.

## STATEMENT PURSUANT TO RULE 21(b)

In addition to the parties listed in the caption of the case in this Court, the parties before the United States Court of Appeals for the Third Circuit included Paul E. Arbogast, Joseph J. Rodgers, Lord Electric Company, and Fischbach and Moore, Inc. Separate petitions for writ of certiorari have been filed on behalf of Paul E. Arbogast; Lord Electric Company; and Fischbach and Moore, Inc. It is contemplated that Joseph J. Rodgers will also file a petition.

## STATEMENT PURSUANT TO RULE 28.1

This Petition is filed on behalf of Sargent Electric Company and two individuals, Frederic B. Sargent and Ralph D. Vryenhoek. Sargent Electric Company has no parent company, no subsidiaries (except wholly-owned subsidiaries), and no affiliates.

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No.____

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1984

SARGENT ELECTRIC COMPANY,
FREDERIC B. SARGENT AND
RALPH D. VRYENHOEK,

*Petitioners*

*v.*

UNITED STATES OF AMERICA,

*Respondent*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Sargent Electric Company, Frederic B. Sargent, and Ralph D. Vryenhoek, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

### OPINION BELOW

The opinion of the Court of Appeals, which has not yet been officially reported, is set forth below at A-1.

### STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1984. Petitioners' timely Petition for

Rehearing was denied on January 4, 1985 (A-31). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

## APPLICABLE STATUTE

Section 1 of the Sherman Act, 15 U.S.C. §1:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

## STATEMENT OF THE CASE

Petitioner Sargent Electric Company ("Sargent Electric") is an electrical contracting company in western Pennsylvania. Petitioners Frederic B. Sargent ("Sargent") and Ralph D. Vryenhoek ("Vryenhoek") are officers of Sargent Electric. All three petitioners, three other electrical contracting companies in western Pennsylvania, and three other individuals were tried before a jury on an indictment charging that all defendants had violated Section 1 of the Sherman Act by rigging bids for electrical contracting projects at the Western Pennsylvania Works of the United States Steel Corporation ("USS").

Although the indictment charged defendants with participating in a conspiracy "*in unreasonable restraint of . . . interstate trade and commerce*" (emphasis supplied), the evidence showed that the contracts allegedly allocated by the defendants were made and that the work to complete them was performed entirely in Pennsylva-

nia; that the electrical contracting services were rendered in connection with capital improvement projects at USS western Pennsylvania plants; that the Pittsburgh office of USS solicited bids in Pittsburgh from contractors who prepared and submitted their bids in Pittsburgh; and that the successful bidders hired the electricians to perform the work only from local Pennsylvania union halls.

The government introduced evidence that the finished products of the USS plants at which the capital improvement projects occurred ultimately moved in interstate commerce. Also, some materials installed by the electrical contractors were manufactured out-of-state. The government presented no proof, however, that the alleged allocation of contracts in any way affected the price, volume or movement of the USS finished products, or that the alleged conspiracy in any way (let alone unreasonably) restrained interstate commerce in the materials installed at the Western Pennsylvania Works. On the contrary, the government stipulated that USS ordered equipment for installation at its plants *prior* to soliciting bids for its installation. There was no showing that the alleged allocation of contracts changed the types, amounts, or prices of supplies purchased or utilized by the electrical contractors.

Petitioners moved for judgments of acquittal, citing the government's failure to prove any anticompetitive purpose or effect with respect to interstate commerce. The District Court (*Cohill*, W.D.Pa.) denied the motions, and, despite petitioners' objections, the charge did not require the jury to find, as a prerequisite to a guilty verdict, that the defendants intended to or actually did restrain interstate commerce through their alleged activities. The jury was instructed that the interstate commerce element of the offense would be satisfied if the jury found that the defendants' alleged activities either occurred in the "flow" of interstate commerce *or* "sub-

stantially affected" interstate commerce.[1] On such instructions, the jury found each petitioner guilty of a felony violation of the Sherman Act. The District Court sentenced Sargent Electric to pay a fine of $1,000,000.00 — the maximum allowed under the Act — and sentenced both Sargent and Vryenhoek to prison terms and $50,000.00 fines.

Petitioners appealed the trial court's refusal to charge the jury that the government must prove an intended or actual restraint on interstate commerce. The Court of Appeals for the Third Circuit (*Aldisert*, Hunter and Weis) affirmed, holding that in order to prove a criminal antitrust violation, the government need only prove some connection to interstate commerce under either an "in commerce" *or* "effect on commerce" theory. A-15. The Court of Appeals held the "in commerce" test to be satisfied simply by the evidence that materials from out-of-state were used at the Western Pennsylvania Works projects. With respect to the "effect on commerce" theory, the Court of Appeals asserted that "*[p]er se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another," and specifically held that the government was not required to prove any adverse impact on interstate commerce. A-16.

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1. In explaining the "flow" of commerce test, the court told the jury: "You need only find that the activities of one of the defendants or alleged co-conspirators were in the flow of interstate commerce." In explaining the "substantially affected" test, the court told the jury: "In determining whether the bid rigging conspiracy alleged in this case had the necessary effect on interstate commerce, you need only find that the interstate commerce involved was substantial."

## REASONS FOR GRANTING THE WRIT

### THIS CASE PRESENTS A SUBSTANTIAL QUESTION REGARDING THE SUBSTANTIVE COMMERCE ELEMENT OF A CRIMINAL VIOLATION OF SECTION 1 OF THE SHERMAN ACT

This case presents a fundamental question regarding the application of Section 1 of the Sherman Act: whether, in proving the substantive interstate commerce element in a criminal prosecution, it is sufficient for the government to establish the sort of minimal contacts with interstate commerce that would give rise to federal subject matter jurisdiction; or whether the government must prove and the jury must find beyond a reasonable doubt that the defendant's conduct had the actual purpose or effect of restraining interstate commerce.

The jurisprudence with respect to interstate commerce as an element of federal subject matter *jurisdiction* is considerable and the guidance provided by the case law is relatively clear. But this is far from true of the *substantive* interstate commerce element, especially in criminal cases. The federal trial and appellate courts are in urgent need of explicit guidance from this Court about the nexus between a defendant's conduct and interstate commerce required to prove a felony violation of the Sherman Act. Lacking such guidance, many courts, just like the Court of Appeals and trial court in this case, have confused the jurisdictional and substantive aspects of cases arising under Section 1 of the Act; they have mixed the tests which are applicable when a court must determine in the first instance whether federal jurisdiction exists and those which are applicable when a factfinder must ultimately decide whether a defendant is guilty of violating the Act.

The confusion which attends this subject has been frequently noted by the courts and commentators who have attempted to unravel the tangle. *See, e.g., Mortensen v. First Federal Savings and Loan Association*, 549 F.2d 884, 890-91 (CA3 1977) ("That the same phrase is both an element of the offense and a vital prerequisite for federal court jurisdiction has caused considerable confusion."); *accord, Rasmussen v. American Dairy Association*, 472 F.2d 517, 521 (CA9 1972), *cert. denied*, 412 U.S. 950 (1973); Comment, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. Pa. L. Rev. 121, 126, 129 (1983); Note, *The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Applications*, 15 Ga. L. Rev. 714, 731 (1981).

This Court's decisions properly suggest that in order to find a substantive violation of Section 1 of the Sherman Act, a jury must find a causal nexus between the defendant's conduct and some adverse impact on interstate commerce — a stronger nexus than that required for federal jurisdictional purposes. *See, e.g., Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974); *United States v. Employing Plasterers Association of Chicago*, 347 U.S. 186 (1954); *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. 460 (1949); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947). This is especially so in criminal cases. *Cf. United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (strictly construing Sherman Act in criminal context).

The statutory language necessarily serves as the proper starting point for any discussion of the substance of the offense.[2] And the plain meaning of Section 1 of the

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2. *See, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982).

Sherman Act is that Congress intended to outlaw only those concerted actions which *restrain interstate commerce:* "Every contract, combination . . . or conspiracy, *in restraint of trade or commerce among the several States* . . . is declared to be illegal." 15 U.S.C. §1 (emphasis supplied).

The legislative history confirms this. During the Senate debate on the legislation, Senator Sherman himself said: "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several states to protect local interests." 21 Cong. Rec. 2456 (1890).

This Court has recognized that the "test of illegality under the Act is the presence or absence of *an unreasonable restraint on interstate commerce.*" *United States v. Yellow Cab Co.*, 332 U.S. at 227 (emphasis supplied). Even in civil cases, when deciding whether a plaintiff has either pleaded or proven a claim, this Court has consistently stressed the critical importance of the component of a restraint on interstate commerce — alternately phrased as "substantial and adverse effects" or "burdens" on such commerce.

For instance, in a pivotal case involving the defendants' motion to dismiss a Sherman Act complaint on the grounds that the relevant conduct occurred wholly intrastate, this Court stated:

> "[G]iven a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall . . . ."

*Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. at 234. The Court addressed this "vital" issue in very similar language in a much more recent case, *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. at 195: "[c]onsistently . . . with the plain thrust of the statutory language, the Court has held that, however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of §1 *if it substantially and adversely affects interstate commerce*" (emphasis supplied).

Similarly, this Court has expressly grounded a reversal of a dismissal of a civil complaint upon the complaint's allegations "that the alleged conspiracy, to the extent it is successful, will place '*unreasonable burdens on the free and uninterrupted flow' of interstate commerce. . . .*" *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. at 746 (emphasis supplied). *Accord*, *United States v. Employing Plasterers Association of Chicago*, 347 U.S. at 189. Attention to actual or intended burdens on interstate commerce is even more important in criminal cases because of the vital interests involved.

The most graphic formulation of the test to be applied in evaluating the substantive interstate commerce element of a Sherman Act claim appears in *United States v. Women's Sportswear Manufacturers Association*, 336 U.S. at 464:

> "The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. *If it is interstate commerce that feels the pinch*, it does not matter how local the operation which applies the squeeze" (emphasis supplied).

The instant case squarely poses the substantial question of whether or not a felony violation of the Sher-

man Act really does require, as this Court's opinions hold, proof that interstate commerce felt some "pinch" from the defendant's conduct.

There is no dispute that relatively few contacts with interstate commerce will establish that federal jurisdiction lies in the first instance. It is now well-settled that jurisdiction may be established in Sherman Act cases under either of two tests — the "in commerce" test or the "effect on commerce" test. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232, 242 (1980). Under both tests, a finding of jurisdiction depends largely upon a finding of contacts with an appreciable amount of commerce. *See McLain*, 444 U.S. at 245; *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 785 (1975).

Both the trial court and the Court of Appeals in the present case apparently believed that these jurisdictional tests — looking quantitatively to the volume of commerce somehow connected with the case, instead of qualitatively to proof of actual or threatened adverse impact on commerce from the alleged illegal acts — governed the substantive issue before them. The trial court imported jurisdictional tests into the jury instructions on the substantive elements of the crime. The Court of Appeals extended the jurisdictional analysis by citing *McLain v. Real Estate Board of New Orleans, Inc.* and its own decision in *Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (CA3 1983).[3]

The Court of Appeals significantly lowered the government's burden of proof in a second closely related way. The court held that, in the case of a *per se* unrea-

3. *Cardio-Medical Associates* arguably set an even lower commerce threshold than the decisions of this Court through its holding that jurisdiction may be satisfied merely by a showing of a shift in the identity of the parties participating in interstate commerce due to a defendant's allegedly illegal activities, even without a corresponding shift in the volume or terms of the transactions in commerce.

sonable restraint, "the government is not required to prove any adverse impact on interstate commerce." A-16. Although the Court of Appeals cited *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), for that proposition, that case does not hold that the presence of a *per se* practice relieves the government of its burden of proving a restraint on interstate commerce. Under the statutory scheme of the Sherman Act, the *per se* doctrine has nothing to do with the interstate commerce element: in the words of *Northern Pacific*, the doctrine simply "avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable . . . ." 356 U.S. at 5. The presence of a *per se* practice may arguably establish that there has been an unreasonable restraint on some type of commerce, but it emphatically does not establish a criminal restraint on *interstate* commerce. In the present case, for example, the alleged bid-rigging involved the intrastate provision of electrical contracting services to USS by local contractors. Under a *per se* analysis, if such allegations were proven, they would only show the presence of an unreasonable restraint on *intrastate* commerce in electrical contracting services.

The Court of Appeals effectively presumed that a *per se* practice in a case passing the "in commerce" *or* "effect on commerce" jurisdictional test would automatically restrain interstate commerce and justify federal criminal prosecution. Such a presumption is evident in the court's comment that "*[p]er se* violations in the electrical contracting field *would have a marked effect on interstate commerce*." A-16 (emphasis supplied). Although such a presumption has been the topic of some discussion among the lower federal courts, *see, e.g., McLain v. Real Estate Board of New Orleans, Inc.*, 583 F.2d 1315, 1320-21 (CA5 1978), *vacated on other grounds*, 444 U.S. 232 (1980), this Court has never approved it. As in any

other criminal case, a presumption may not be employed in a Sherman Act prosecution to remove from the government its burden under the Due Process Clause of proving every element of the crime beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 364 (1970); *see Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *United States v. United States Gypsum Co.*, 438 U.S. at 435 (forbidding use of presumption in Sherman Act prosecution to establish element of intent).

If a purpose or effect of restraining, substantially and adversely affecting, burdening, or otherwise "pinching" interstate commerce is a substantive element of a Sherman Act offense, the Court of Appeals committed a critical error of law that will have very broad consequences in criminal antitrust enforcement.

Each year, the Justice Department institutes dozens of new proceedings charging scores of defendants with felony violations of Section 1 of the Sherman Act. Increasingly in recent years, the defendants, like petitioners, tend to be contractors primarily engaged in the intrastate provision of services and accused of local bid-rigging or analogous intrastate conspiracies.[4] Hundreds of persons are being subjected to federal prosecution on the strength of commerce evidence, like that presented at trial here, that suffices only to show jurisdiction. On the plain language of the statute and this Court's prior holdings, we submit that that is wrong. But if it is not wrong, the fair administration of justice requires a clear enunciation of the principles which permit it. Petitioners urge this Court to correct the misunderstanding prevalent in the Third Circuit and some other federal courts by

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4. As of March 31, 1983, the Justice Department was conducting 43 grand jury investigations of possible antitrust violations by persons engaged in electrical contracting, highway construction, or water and sewer construction. 44 Antitrust & Trade Reg. Rep. (BNA) 876 (April 28, 1983).

using this case to define the substantive commerce element of a criminal violation of Section 1 of the Sherman Act.

## CONCLUSION

A Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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February 21, 1985

# APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 84-3242, 84-3243, 84-3244, 84-3253,
84-3266, 84-3267, and 84-3268

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THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Sargent Electric Company,
*Appellant* in No. 84-3242

(D.C. Crim. No. 83-00098-04)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST

FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Frederic B. Sargent,
*Appellant* in No. 84-3243

(D.C. Crim. No. 83-00098-09)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Ralph D. Vryenhoek,
*Appellant* in No. 84-3244

(D.C. Crim. No. 83-00098-10)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT

RALPH D. VRYENHOEK
JAMES L. OESTERLE

Paul E. Arbogast,
*Appellant* in No. 84-3253

(D.C. Crim. No. 83-0009-08)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Joseph J. Rodgers,
*Appellant* in No. 84-3266

(D.C. Crim. No. 83-00098-07)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK

JAMES L. OESTERLE

Lord Electric Company,
*Appellant* in No. 84-3267

(D.C. Crim. No. 83-00098-03)

THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Fischbach and Moore, Incorporated,
*Appellant* in No. 84-3268

(D.C. Crim. No. 83-00098-01)

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Appeal from the United States
District Court for the
Western District of
Pennsylvania - Pittsburgh

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Argued
October 3, 1984
Before: ALDISERT, *Chief Judge*,
HUNTER and WEIS, *Circuit Judges*.

(Filed December 10, 1984)

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**OPINION OF THE COURT**

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ALDISERT, *Chief Judge*.

Three principal issues are presented in this appeal from sentences imposed on a guilty verdict in a criminal anti-trust prosecution: whether the proof at trial varied from the indictment charging a single, continuing conspiracy; whether the government introduced sufficient evidence to prove the interstate commerce element of the Sherman Act violation; and whether this court should set aside or modify, on appeal, the one million dollar fine levied against defendant Fischbach & Moore. Appellants assert

several less significant arguments, including the admission of an allegedly prejudicial government exhibit; prosecutorial misconduct during closing argument; errors in jury instructions; and the denial of a continuance to defendant Arbogast. Because we find no reversible error, we affirm the judgment of the district court.

I.

For approximately seven years, from 1974 to 1981, representatives of several electrical contracting companies met at the Duquesne Club in Pittsburgh. The purpose of these meetings was to allocate electrical construction projects, by bid rigging, at the Western Pennsylvania Works (Works) of United States Steel (USS). Whenever one of the companies desired to rig a bid, that company's representative would telephone the other contractors and arrange a meeting. After deciding among themselves which firm would receive the contract, that firm's representative would contact the other contractors and would tell them what bid to submit, ensuring that his firm's bid would be the lowest. Some of the firms kept track of the allocations to ensure that each contracting company received its fair share of work.

As a result of investigating this bid rigging scheme, the government accused a number of the electrical contractors and their employees of antitrust violations. The indictment charged them with violating § 1 of the Sherman Act by conspiring to allocate electrical construction projects at the Western Pennsylvania Works, to fix the prices at which those projects were bid, and to submit noncompetitive, collusive, and rigged bids on those projects. Although some of the defendants plea bargained to the charges and avoided trial, three electrical contracting companies, Fischbach and Moore (F&M), Sargent Electric, and Lord Electric, and four individual

employees, Paul Arbogast, Joseph Rodgers, Frederic Sargent, and Ralph Vryenhoek, stood trial on the charges. They are the appellants before us.

Prior to trial, one of the defendants, Paul Arbogast, was indicted and prosecuted in Montana for an unrelated Sherman Act violation. The district court postponed the Western Pennsylvania trial once because of the Montana action. In mid-January 1984, Arbogast again moved for a continuance, the Montana trial not having ended and the Western Pennsylvania trial scheduled tc begin in early February. The court denied this motion. Arbogast was acquitted in Montana on January 21 and began trial in Pittsburgh on February 6.

To narrow the scope of the trial, the government issued a bill of particulars, which it later amended, identifying contracts within the scope of the conspiracy. The proof at trial related to some, but not all, of the contracts on this list. The government also introduced extensive evidence to prove the interstate commerce jurisdictional element. This evidence included Government Exhibit 32 (Govt. Ex. 32), a file of invoices and freight bills for electrical materials and equipment bought by USS from out of state vendors for use in electrical construction projects at the WPW.

After a finding of guilty by the jury, the district court imposed both fines and prison sentences on the individual defendants. The three corporate defendants received fines of one million dollars each, the statutory maximum under § 1 of the Sherman Act. Defendants now appeal their convictions, and have asserted a long list of contentions, requiring this opinion to be more lengthy than what we believe to be appropriate in this court.

## II.

Appellants raise three principal contentions. First, appellants F&M, Lord Electric, Sargent Electric, Paul Arbogast, and Joseph Rodgers allege a variance

between the proof and the indictment. In a related argument, F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent allege that the government did not prove the interstate commerce element of the Sherman Act charge. In the third major contention, F&M alleges both that its sentence was illegal and that the trial court abused its discretion in imposing sentence.

The precepts guiding our review of the variance argument are familiar. Our polestar is to determine whether "there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision." *United States v. Palmeri*, 630 F.2d 192, 203 (3d Cir. 1980)(quoting *Burks v. United States*, 437 U.S. 1, 17 (1978)), *cert. denied*, 450 U.S. 967 (1981). Additionally, *Kotteakos v. United States*, 328 U.S. 750 (1946), sets forth the two-pronged test appellants must meet to succeed in this specific contention: (1) that there was a variance between the indictment and the proof and (2) that the variance prejudiced some substantial right of the defendants. *Id.* at 752, 756.

In the usual criminal case, our review of a sentence imposed by the district court is extremely circumscribed. *United States v. Felder*, 706 F.2d 135, 137 (3d Cir. 1983).[1] Generally, if the sentence falls within the statutory maximum, the matter is not reviewable on appeal. *United States v. Dickens*, 695 F.2d 765, 782 n.26 (3d Cir. 1982), *cert. denied*, 103 S. Ct. 1792 (1983). We may review the sentence, however, if there is a showing of illegality or abuse of discretion. *United States v. Fessler*, 453 F.2d 953, 954 (3d Cir. 1972). We now consider appellants' variance argument.

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1. *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, ___ (1984)(to be codified at 18 U.S.C. § 3742(a))(effective Nov. 1, 1986)(will allow review of sentences under limited circumstances after Act's effective date).

III.

Appellants F&M, Lord Electric, and Sargent Electric argue that because the government's evidence sought to establish multiple conspiracies and not the single, continuing conspiracy charged in the indictment, the convictions must fall as illegal. They allege variance in two respects: (1) that the government interpreted the indictment to charge that *all* electrical contracting bids were rigged during the time of the conspiracy, later reducing the number of bids in the bill of particulars and further reducing them at trial and (2) that the government proved not one continuing conspiracy, but a series of independent conspiracies, *i.e.*, that each contract the government proved the defendants rigged constituted a separate conspiracy.

A.

The indictment charged that the defendants conspired to "allocate among themselves electrical construction projects" at the Works; to "fix the prices at which electrical construction projects" were bid; and to "submit noncompetitive, collusive, complementary and rigged bids." App. at 21a-22a. But the indictment did not state that the conspiracy encompassed all bids or all contracts made during the seven-year period. Although the government so stated at a pre-trial conference, even if the appellants relied on these government representations or the bill of particulars as to the extent of proof, neither can modify the scope of the indictment. *United States v. Critchley*, 353 F.2d 358, 362 (3d Cir. 1965)(bill of particulars).

Even had the indictment read in terms of "all construction projects" and "all bids," the government still would have introduced sufficient evidence to prove the crimes charged. To prove a conspiracy to rig all bids, the government was not required to show that the defendants actually rigged all bids. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59

(1940). The defendants could have conspired to rig all bids, but failed to achieve that objective for one reason or another, e.g. because the bid lists included companies with which the defendants could not cooperate. Evidence of the fourteen rigged bids both proved that a conspiracy to rig bids existed and permitted the jury to conclude that the conspiracy encompassed all bids.

B.

We also conclude that the government introduced sufficient evidence to justify a jury finding of only a single conspiracy. The government proved that the defendants met, over a period of several years, at the Duquesne Club for the sole purpose of rigging bids and allocating contracts. The government introduced evidence to prove that all the participants knew the purpose of the club meetings and that they met as a group, thus negating the argument that separate groups of the defendants were conspiring together, with the same goal, but with their actions unconnected. More important, the government showed that some of the defendants kept records of which company received which job, ensuring that each firm would receive its fair allotment of the contracts. This recordkeeping indicated a single conspiracy that continued over time, and not separate conspiracies involving only certain contracts.

Because we hold that defendants did not prove a variance between the proof and the indictment, we need not consider the prejudice prong of *Kotteakos*.

C.

In a related argument, appellant Arbogast maintains that the proof varied from the indictment in that the government proved one conspiracy, but that conspiracy had no effect on interstate commerce. As

support for this contention, Arbogast expressly declines to rely on *Kotteakos*, conceding that he suffered no prejudice from the variance alleged. Instead, Arbogast relies on the language of the Sherman Act requiring the conspiracy to restrain "trade or commerce among the several States." 15 U.S.C. § 1.

As we understand his argument, he contends that the government proved a single agreement to rig bids only at the time one of the defendants would telephone the others to arrange a meeting. This agreement, Arbogast states, was harmless and restrained no trade. Rather, the ensuing agreements reached at the meetings restrained trade, but those fourteen separate agreements were not charged in the indictment. We decline to adopt this convoluted construction of the offense charged in the indictment.

The Arbogast argument starts to collapse when he concedes, as he does, that he conspired to fix bids when one of the other conspirators made a telephone call. Because we cannot isolate the original telephone call with the subsequent action triggered by the call, the keystone of his argument falls out. These telephone calls and the meetings that followed were an integral part of the conspiracy to fix bids, to which he agreed. To view the conspiracy in terms of artifical separate and distinct phases would give no meaning to the agreement into which Arbogast entered and for which he was indicted. Had the defendants not contemplated making the telephone calls, no reason existed for them to agree to rig bids if the calls were made. Rather, the calls and Duquesne Club meetings constituted concerted activity to further the conspiracy to rig bids. As such, anticompetitive effects of these actions cannot be separated from the initial agreement to rig bids.

IV.

In a more particularized argument, defendant Rodgers contends that the government did not introduce evidence sufficient for the jury to find that he knowingly joined the continuing conspiracy charged in the indictment. He argues that he began to attend the Duquesne Club meetings only as a casual observer to protect the interest of his company Foley Electric and that his appearance was long after the other defendants entered into a conspiracy. To join a conspiracy, the government generally must prove two different types of intent: (1) the basic intent to agree, which is necessary to establish the existence of the conspiracy and (2) the more traditional intent to effectuate the object of the conspiracy. *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978).

In a situation very similar to that of Rodgers, in *United States v. Continental Group, Inc.*, 603 F.2d 444 (3d Cir. 1979), defendants were convicted of a 26-year continuing conspiracy to fix the price of consumer bags. One defendant, Chase Bag, maintained that the government had introduced insufficient evidence to support its conviction, arguing that its behavior was legitimate price followership. *Id.* at 448. We affirmed Chase Bag's conviction, basing our decision on, among other things, Chase Bag's adoption of an unpublished price list of a competitor, St. Regis. We stated:

> Had the St. Regis incident been the only evidence against Chase Bag, we might agree that the government's proof varied substantially from the indictment. We note, however, that Chase Bag's participation in various meetings where prices were discussed, its exchange of price

> information with competitors, and its parallel pricing policies, although perhaps innocent by themselves, are cast in a different light by [Chase Bag's] apparent agreement with [St. Regis] to fix prices.

*Id.* at 455.

Although the issue is close, we are persuaded that the government introduced sufficient evidence to demonstrate that Rodgers knowingly entered the continuing conspiracy. Although he joined the Duquesne Club meetings at a point far into the conspiracy, his purpose in going there was to obtain contracts (specifically the contract designated as Govt. Ex. 23) for his company, Foley Electric. After it was agreed that Foley was to be the low bidder on this contract, Rodgers arranged the bid submissions on this contract by telephoning the other companies and telling them what prices to bid. The most damning evidence against Rodgers was his alleged reason for wanting this particular contract: "because he had cooperated with other people at the meeting and he felt that he should be given some consideration." App. at 1826a-27a. Viewed in the light most favorable to the government, this remark evidences Rodgers's knowledge both of the continuing nature and goals of the conspiracy and his intent to join the conspiracy and further its objectives. Rodgers's actions only confirm his understanding of and familiarity with the conspiracy.

If the testimony pertaining to Govt. Ex. 23 was the only evidence on which the government relied, perhaps Rodgers would have had a stronger case. See, e.g. the one-time only exception we suggested in *Continental Group*, 603 F.2d at 455. But here the government introduced evidence of Rodgers's involvement with another rigged contract, designated as Govt. Ex. 27. Although testimony was conflicting as to whether the

contract was rigged over the phone or at a club meeting, viewed in the light most favorable to the government, the jury could have found that Rodgers also participated in rigging this contract. We therefore concluded that substantial evidence existed to tie Rodgers to the conspiracy.

We now turn to appellants' interstate commerce argument.

V.

Appellants F&M, Lord Electric, Ralph Vryenhoek, and Frederic Sargent argue that the government did not prove the interstate commerce element of the Sherman Act charge.

Section 1 of the Sherman Act proscribes "every contract, combination . . ., or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. The government may prove the connection of the restraint to interstate commerce under either of two independent theories. *McLain v. Real Estate Board of New Orleans Inc.*, 444 U.S. 232, 242 (1980). An "in commerce" theory requires that the government prove that (1) a substantial volume of interstate commerce is involved with the challenged activity and (2) the challenged activity is an essential, integral part of the transaction and is inseparable from its interstate aspects. *Id.* at 244. An "effect on commerce" theory, applies to primarily intrastate activity. The government must show that (1) a substantial amount of interstate commerce was involved and (2) the challenged activity has a "not insubstantial effect" on interstate commerce. *Id.* at 245-46; *see also Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d Cir. 1983).

The government may prove the nexus between interstate commerce and the challenged activity through either the activities of the target of the

antitrust violation or defendant's activities. *Id.* at 74. Because the activities involved in this case, price-fixing and bid rigging, are *per se* violations, *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958)(price fixing); *United States v. Brighton Building & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979)(bid rigging); *United States v. Flom*, 558 F.2d 1179, 1183 (5th Cir. 1977) (bid rigging), the government is not required to prove any adverse impact on interstate commerce. *Northern Pacific*, 356 U.S. at 5.

Based on the trial testimony, we hold that the government introduced substantial evidence to support a jury finding that either the electrical contracting services were in commerce or that the defendants' activities affected interstate commerce. As to the in commerce theory, the government introduced evidence to show that the contractors and USS ordered substantial amounts of materials from out of state for use on the USS jobs. Not only pieces of equipment used in the Works jobs cost tens of thousands of dollars, but often showed that materials were shipped directly from out-of-state manufacturers to USS job sites. The electrical contracting services thus involved a substantial amount of interstate commerce. Because the materials were shipped into the state solely in connection with the contracting jobs, and were otherwise useless, the contracting services were an essential, integral part of interstate commerce.

Moreover, the evidence also serves to prove the interstate element of the Sherman Act by satisfying the affecting commerce theory. Clearly, a large amount of materials used in the contracting jobs traveled through interstate commerce. *Per se* violations in the electrical contracting field involving USS would have a marked effect on interstate commerce, especially by shifting purchases from one contractor to another.

We next consider F&M's argument pertaining to its sentence.

VI.

F&M alleges both that its sentence was illegal and that the judge abused his discretion in imposing sentence. The illegality argument is based on the theory that the one million dollar fine is disproportionate, thus violating the eighth amendment. F&M contends that the judge abused his discretion by basing the fine on the one million dollar penalty accepted by another defendant, the Foley Company, as part of its plea bargain.

F&M relies on *Solem v. Helm*, ___ U.S. ___, (51 U.S.L.W. 5019, June 28, 1983), in arguing that its fine is disproportionate. The Supreme Court suggested three factors for a court to consider in reviewing a sentence for disproportionality: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Id.* at ___, 51 U.S.L.W. at 5023. Evaluating these factors, we hold that the district court's sentence was not disproportionate and thus not illegal.

F&M brazenly committed a grave crime. The jury found the company guilty of conspiring to commit *per se* violations of the Sherman Act in a series of meetings that obviously were illegal. Moreover, F&M was one of the ringleaders of that conspiracy. As to the sentences imposed in the same jurisdiction, the penalties levied on the other defendants in this case provide a good example. Every individual defendant received a fine *and* a prison sentence; all the corporate defendants received one million dollar fines. Thus, in comparison, F&M's fine does not appear severe. Moreover, in comparing the sentence with those received by

defendants in other jurisdictions, F&M provided extensive statistics on the infrequency of the imposition of the maximum fine. These statistics, however, illustrate that defendants frequently are fined, and fined in large amounts. Although F&M's one million dollar fine is extensive, its amount was the expression of the Congress, not the judiciary. Accordingly, we hold that we hold that the fine is not disproportionate to the gravity of the offense, the public policy considerations implicated and the Congressional determinations.

F&M also contends that the district court abused its discretion by taking another defendant's punishment into account when fining F&M. F&M argues that because the judge gave no reasons for the fine imposed, it is reasonable to believe that he relied on improper motives. This court does not require a judge to elucidate his sentencing rationale.[2] *United States v. Del Piano*, 593 F.2d 539, 540 (3d Cir.)(per curiam), *cert. denied*, 442 U.S. 944 (1979). Nor does F&M offer any evidence, other than the speculations of its excellent lawyers, of the judge's reliance on improper factors in the sentencing process. In short, "aside from characterizing [the fine] as excessive, defendant[] [has] presented no reason which would justify a conclusion that the sentence[] [was] anything other than the result of a proper exercise of judicial judgment." *Government of the Virgin Islands v. Rodriguez*, 423 F.2d 9, 11 (3d Cir. 1970). For the above reasons, we decline to set aside F&M's sentence.

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2. *But see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. ___, ___ (1984)(to be codified at 18 U.S.C. § 3553(c)(effective Nov. 1, 1986)(court will be required to "state in open court the reasons for its imposition of the particular sentence" after the Act's effective date).

VII.

We now consider defendants' remaining arguments in turn.

A.

Lord Electric contends that the district court should not have admitted Govt. Ex. 32, the file of purchase orders and invoices, because the exhibit was irrelevant. Additionally, it argues that even if Govt. Ex. 32 were relevant, the evidence was prejudicial and the trial judge should have excluded the exhibit pursuant to Rule 403, Federal Rules of Evidence. Because the initial relevancy decision implicates the interpretation and application of legal precepts, our review is plenary. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 269 (3d Cir. 1983); *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 102-03 (3d Cir. 1981). The Rule 403 decision, however, is reviewed under an abuse of discretion standard. *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d at 269-70.

For evidence to be admissible under Rule 402, it must be relevant. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, F.R. Evid. The Government sought to introduce exhibit 32 to prove the interstate commerce element of Sherman Act jurisdiction.

As noted earlier, and contrary to what defendant Lord asserts, the interstate commerce activities of the target of the antitrust violation, as well as the defendant, are relevant to a finding on the interstate commerce element. *Cardio-Medical Associates*, 721 F.2d at 74. Because this evidence tended to make the

existence of the consequential fact of involvement with interstate commerce more probable than if the evidence were not available, Govt. Ex. 32 was relevant.

Yet even if evidence is relevant, the court may exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, F.R. Evid. The defendant argues that Govt. Ex. 32 was more prejudicial than probative because the jury could not identify which invoices and freight bills related to the contracts at issue. The jury thus could have believed that evidence of every purchase of materials in interstate commerce contained in the file was relevant to proving the interstate commerce element of the crime.

Contrary to what Lord asserts, the jury could tie interstate purchases to particular contracts, by matching a project number to a job number. Although the process might be time consuming and the correlation not always perfect, this procedure removed the prejudice about which defendant was concerned, and tilted the balance in favor of admissibility.

B.

Sargent Electric argues that it is entitled to a reversal because of allegedly improper remarks made by the prosecutor during his closing argument. In evaluating the prosecutor's comments, our standard of review is "whether such remarks, in the context of the entire trial, were sufficiently prejudicial to violate defendant's due process rights." *United States v. Scarfo*, 685 F.2d 842, 849 (3d Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

Sargent isolates three instances of misconduct to substantiate its contention. It states that the

prosecutor expressed his subjective feelings as to its guilt, yet identifies no page in the transcript where this occurred. The government points to one remark of the prosecutor's: "I submit to you that the defendants are guilty . . . on the facts and the evidence . . . ." App. at 3673a. By tying his remarks to evidence on the record, *United States v. Schartner*, 426 F.2d 470, 477 (3d Cir. 1970), the prosecutor's remarks were not prejudicial.

Likewise, defendant's claims regarding other comments are baseless. The statement by the prosecutor that "[w]hat I would like to do is summarize what I think the issues in the case are . . .," app. at 3610a, was merely a figure of speech, and not an injection of his personal feelings into the trial. The reference to Sargent Electric's financial reports, app. at 3651a, although the reports were not in evidence, was proper rebuttal to the defendant's assertion that it had made a complete financial disclosure to USS. *United States v. Somers*, 496 F.2d 723, 740 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974).

Sargent Electric makes one final related argument for reversal, arguing that the prosecutor's rebuttal was so lengthy -- one and a half hours -- and non-responsive as to amount to a second closing argument, permitting surrebuttal on the part of the defense. The judge had the discretion to limit the prosecutor's rebuttal and chose not to do so. In view of the complicated nature of the case, the rebuttal was not overly long. Considering all the circumstances of the case, neither the rebuttal argument nor the prosecutor's remarks in any way violated defendant's due process rights.

C.

Defendant Arbogast argues that the trial court should have granted his second request for a continuance because his Montana trial ended shortly before the Pittsburgh trial began. In reviewing the trial

court's decision, an appellate court will reverse the lower court only if the judge abused his discretion. *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); *Paullet v. Howard*, 634 F.2d 117, 119 (3d Cir. 1980)(per curiam). The factors a court should consider when presented with a motion for a continuance include: the efficient administration of criminal justice; the accused's rights, including an adequate opportunity to prepare his defense; and the rights of other defendants whose trials are delayed because of the continuance. *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214-15 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970).

In this instance, the trial court did not abuse its discretion. The judge's denial of the second continuance neither abridged Arbogast's right to due process nor was insupportable in light of the circumstances of the case.

Arbogast's reasons for seeking the continuance included giving him more time to prepare his defense and permitting him to be defended by counsel of his choice. Although this case is a fairly complex antitrust suit, Arbogast was aware of the general perimeters of the case against him when the district court first postponed the trial in October. Moreover, Arbogast discussed his defense for the Pittsburgh case with counsel during the Montana trial. Although Arbogast's first choice as counsel did not represent him in Pittsburgh, another lawyer from the same firm took over the representation. Despite these circumstances, Arbogast had approximately two weeks to devote to his Pittsburgh defense. Courts have found no constitutional violation in appointment of counsel cases when the defendant and his attorney have had much less time to prepare. *Ungar*, 376 U.S. 575 (five days to answer show cause order); *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186 (3d Cir. 1969)(counsel appointed on day of trial).

Additionally, the judge already had continued the trial once, for a period of several months. To have postponed this complicated trial again would not only have contributed to calendar congestion, but, more important, would have made the other defendants involved continue to wait to have their day in court.

D.

Sargent Electric, Lord Electric, Frederic Sargent, and Ralph Vryenhoek argue that the judge erred in giving instructions: (1) by shifting the burden of proof to the defendants by an instruction that price-fixing is *per se* illegal; (2) by failing to charge the jury fully on sham bidding; (3) by his instruction removing the element of intent from the jury's consideration; and (4) by his instruction on the "affecting commerce" theory pertaining to the interstate commerce element of the Sherman Act.

In evaluating the district court's ruling on points for charge, the standard of review is abuse of discretion. *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 199 (3d Cir. 1970). Once the court has given an instruction, we must "determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury." *Ayoub v. Spencer*, 550 F.2d 164, 167 (3d Cir.), *cert. denied*, 432 U.S. 907 (1977); *see also United States v. Park*, 421 U.S. 658, 675 (1975). The trial court should be reversed only if the instruction was capable of confusing and thereby misleading the jury. *Idzojtic v. Pennsylvania Railroad Co.*, 431 F.2d 1029, 1036 (3d Cir. 1970) (Aldisert, J., dissenting). We now address defendants' contentions *seriatim*.

The Supreme Court repeatedly has held that *per se* violations require no proof of anticompetitive effect to constitute a violation of the Sherman Act. *Northern Pacific Railway*, 356 U.S. at 5; *United States v.*

*Socony-Vacuum Oil Co.*, 310 U.S. 150, 220-22 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-97 (1927). Consequently, an instruction to this effect would "fairly and adequately" submit the issue to the jury. Moreover, this argument that the instruction creates an irrebuttable presumption has been considered and rejected by several jurisdictions. *See, e.g., United States v. Koppers Co.*, 652 F.2d 290, 293-96 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States v. Manufacturers' Association of the Relocatable Building Industry*, 462 F.2d 49, 52 (9th Cir. 1972).

Sargent Electric argues that the court should have given a more complete instruction on sham bidding; it maintains that the instruction should have identified several aspects of USS's bidding procedures as potentially sham bidding and that the sham bidding instruction should have related to the rule of reason, rather than the *per se*, approach. The judge's instructions, however, adequately presented the issue to the jury.

The court initially referred to sham bidding in general terms. The court then instructed the jury that if USS acquiesced in the allocation of contracts, they should find the defendants not guilty. The court thus presented the essence of the sham bidding defense to the jury, although not in terms of specific practices. Moreover, Sargent Electric never requested the court to give the instruction in any particular language. Thus, the court's failure to adopt language other than that which it used is not reversible because the instruction did not represent "plain error resulting in a manifest denial of justice." *United States v. Palmeri*, 630 F.2d 192, 201 (3d Cir. 1980).

Additionally, no reason existed for the judge to couple the sham bidding instruction with a reasonableness instruction. Price-fixing and bid

rigging are *per se* violations. Defendant's conduct, even if USS were a monopsonist as defendant contends, did not fall in any "gray zone" requiring a reasonableness instruction. *See United States v. Giller*, 599 F.2d 541 (3d Cir.), *cert. denied*, 444 U.S. 866 (1979). For the reasons stated above, the district court did not err in giving the challenged instruction.

Sargent Electric also alleges that the court's instructions removed consideration of the element of intent from the jury. The court instructed that no showing of specific intent to disobey the law or restrain trade or knowledge of the illegality of the activities was necessary and defendants could be convicted if they knowingly formed the conspiracy or knowingly joined the conspiracy. App. at 3722a. Prior to this, the court also instructed that intent could be proved by showing that the acts of the defendants had the effect of bid rigging and the acts were undertaken with knowledge of the bid rigging; or defendants' acts did not have any proscribed effects, but the defendants undertook those acts with a conscious purpose of bringing about the proscribed effects. *Id.* at 3721a-22a.

The trial court's instructions avoided the problems of presuming intent simply from the commission of certain acts discussed in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) and *Sandstrom v. Montana*, 442 U.S. 510 (1979). Here, the jury was asked to find not only that the defendants knowingly joined or formed the conspiracy, but that they also meant to bring about or did bring about the effects proscribed by the Sherman Act. Moreover, not only did the instructions follow the language accepted by this court, especially as to specific intent, *see United States v. Continental Group, Inc.*, 603 F.2d 444, 462-63 (3d Cir. 1979), but part of the instructions followed the exact language of defendants' proposed instruction No. 14. App. at 3819a. Viewed as a whole,

the instructions were a correct statement of the law and fairly and adequately presented this issue to the jury.

Appellants also object to the jury instructions pertaining to the "affecting commerce" theory because the judge stated that the jury need only find that the commerce involved was substantial and that they did not have to find a rise in prices or a shift in commerce and the judge instructed that the government could satisfy either the in commerce or affecting commerce theory to prove the interstate commerce element of the Sherman Act. The court's instructions, however, correctly stated the law. *Per se* violations require no proof of an anti-competitive effect on commerce. *Northern Pacific Railway*, 356 U.S. at 5. Also, evidence that supports either theory pertaining to the interstate commerce element is sufficient to establish a Sherman Act violation. *McLain v. Real Estate Board of New Orleans*, 444 U.S. at 242.

E.

Relying on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965), defendant Rodgers alleges prejudice because the district court failed to marshal the evidence against him. A trial court, however, need not marshal the evidence, especially if the trial is complex. *United States v. Gillilan*, 288 F.2d 796, 798-99 (2d Cir. 1961). Unlike *Kelly*, where the evidence did not connect the defendant to the single conspiracy charged, Rodgers suffered no prejudice by a failure to marshal the evidence because that evidence directly connected him to the conspiracy.

VIII.

We have carefully considered all contentions presented by the appellants. The judgment of the district court will be affirmed in all respects.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 84-3242, 84-3243, 84-3244, 84-3253, 84-3266,
84-3267, and 84-3268

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THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E.C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

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Appeal from the United States
District Court for the Western
District of Pennsylvania - Pittsburgh

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Argued
October 3, 1984
Before: ALDISERT, *Chief Judge*,
HUNTER and WEIS, *Circuit Judges*.

(Filed December 10, 1984)

## ORDER AMENDING OPINION

It is hereby ordered that the opinion in the above, filed December 10, 1984, be amended as follows:

Page 10, lines 1 and 2: delete "Lord Electric, and Sargent Electric" and substitute "Sargent Electric, and Paul Arbogast"

Page 11, line 30: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 1: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 2: change "he" to "it"

Page 12, line 4: delete "Arbogast" and substitute "appellant"

Page 12, line 8: change "his" to "this"

Page 12, line 8: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 12: delete "Arbogast" and substitute "appellant"

Page 12, line 18: delete "The Arbogast" and substitute "Lord Electric's"

Page 12, line 18: change "he" to "it"

Page 12, line 19: change "he" to "it" [twice]

Page 12, line 23: change "his" to "this"

Page 12, line 25: change "he" to "appellant"

Page 12, line 28: delete "Arbogast" and substitute "Lord Electric"

Page 12, line 29: change "he" to "it"

BY THE COURT

/s/ Ruggero J. Aldisert

*Chief Judge*

BY THE COURT

/s/ Ruggero J. Aldisert

Chief Judge

Dated: December 19, 1984

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 84-3242, 84-3243 and 84-3244

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THE UNITED STATES

vs.

FISCHBACH AND MOORE, INC.
THE HOWARD P. FOLEY COMPANY
LORD ELECTRIC COMPANY, INC.
SARGENT ELECTRIC COMPANY
E. C. ERNST, INC.
TRI-CITY ELECTRIC COMPANY, INC.
JOSEPH J. RODGERS
PAUL E. ARBOGAST
FREDERIC B. SARGENT
RALPH D. VRYENHOEK
JAMES L. OESTERLE

Sargent Electric Company, *Appellant* in No. 84-3242
(D.C. Crim. No. 83-00098-04)
Frederic B. Sargent, *Appellant* in No. 84-3243
(D.C. Crim. No. 83-00098-09)
Ralph D. Vryenhoek, *Appellant* in No. 84-3244
(D.C. Crim. No. 83-00098-10)

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Aldisert

*Chief Judge*

Dated: Jan. 4, 1985